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DIRECTOR OF FOREST SARAWAK & ORS v. NICHOLAS MUJAH ASON & ORS

FEDERAL COURT, KUCHING
AHMAD MAAROP PCA
ZAHARAH IBRAHIM CJ (MALAYA)
B ALIZATUL KHAIR OSMAN FCJ
ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 01(f)-30-06-2017(Q)]
18 OCTOBER 2019

C

NATIVE LAW AND CUSTOM: *Declaratory order – Application for – Plaintiffs descendants of permanent residents of forest reserve – Gazette Notification No 760 entitling plaintiffs right to forage or harvest forest produce subject to express conditions – Whether rights similar to practices of 'pulau galau' and 'pemakai*
D *menoa' – Whether rights of plaintiffs statutorily created and distinguished from claimed native customary rights practices – Whether conditions attached showed that State retained control over forest reserve – Whether State failed to exercise control – Whether encroachment upon forest reserve without plaintiff's permission amounted to trespass – Whether plaintiffs entitled to damages for trespass – Sarawak*
E *Forest Ordinance 1934, s. 12(2)*

TORT: *Trespass – Encroachment onto land – Plaintiffs descendants of permanent residents of forest reserve – Gazette Notification No 760 entitling plaintiffs right to forage or harvest forest produce subject to express conditions – Licensed timber company granted concession area for extraction of timber – Construction of rail line*
F *over part of lands in forest reserve causing damage to environment – Whether encroachment upon forest reserve without plaintiff's permission amounted to trespass – Whether plaintiffs in legal occupation of forest reserve – Whether corresponding steps taken by State to alter conditions – Whether plaintiffs entitled to damages for trespass – Sarawak Forest Ordinance 1934, s. 12(2)*

G The first defendant was a licensed timber company that was granted a concession area for the extraction of timber, whilst the second defendant was the contractor of the first defendant in carrying out and/or felling and extracting merchantable timber logs including the felling and extracting the logs within the specified concession area. The plaintiffs, natives by race, *ie*,
H Ibans from three different villages within the town of Simunjan, Sarawak, claimed that at all material times they were the rightful owners, claimants, of a Communal Forest Reserved land situated at/or along Sungai Sebangan, Simunjan, Sarawak. On or about January 2006, the plaintiffs discovered that the first and second defendants and/or their employees or agents or servants
I had trespassed their lands by building a railway track to carry out logging activities over part of their lands causing some serious damage to the

environment, namely loss of timber and polluting the river system. Therefore, a complaint was lodged with the District Officer Simunjan on the encroachment of a logging activity within the said lands, but no action was taken. The first and second defendants refused to negotiate with the plaintiffs on the ground that the plaintiffs had no right over the land claimed by the plaintiffs. On 14 September 2006, the plaintiffs caused a physical blockage at the Bukit Bediri Forest Reserve to stop the felling and extracting of the timber therein and subsequently, made a police report, complaining of further encroachment by the first and second defendants. The plaintiffs also claimed that the boundary of the concession area had encroached onto their lands and had disregarded the plaintiffs' rights and therefore, bad in law and void. The plaintiffs thereafter filed an action in the High Court claiming for declaratory reliefs in respect of the plaintiffs' native entitlement to the said area, including the constitutionality of the timber license. The plaintiffs further claimed for aggravated and exemplary damages to be paid for the alleged trespass to their land. The High Court Judge ('HCJ') ruled in favour of the plaintiffs and granted the terms that: (i) the plaintiffs had inherited native customary rights ('NCR') over Bukit Bediri Forest Reserve and Stika Forest; (ii) the construction of the rail line across these two forests constituted an encroachment and a trespass of the land; and (iii) the defendants were jointly and severally liable to pay damages for the trespass. Dissatisfied, the third, fourth and fifth defendants ('appellants') appealed to the Court of Appeal ('COA'). The COA dismissed the appeal, having found that the Second Schedule of *Gazette* Notification No 760 ('Second Schedule') expressly stated that the forest reserve was constituted for the benefit of the permanent inhabitants of the seven longhouses stated therein. The appellants, thus, obtained leave to appeal on three questions of law. However, pursuant to the decision of the Federal Court in the case of *Director of Forest, Sarawak and Anor v. TR Sandah Tabau And Other Appeals* ('*TR Sandah*'), the appellants confined their appeal to only one question of law, *ie*, whether the imposition of conditions within the Second Schedule entitled the State to retain control over areas other than cleared land or *temuda* within Bukit Bediri Forest Reserve. In *TR Sandah*, the Federal Court decided that the practices of *pulau galau* and *pemakai menoa* among the Ibans, although admittedly customary, were nevertheless not recognised under the law of Sarawak. Only the customary practice of *temuda*, or clearing of virgin forest jungles for cultivation is recognised and that has a cut-off date of 1 January 1958.

Held (allowing appeal in part)
Per Abang Iskandar FCJ delivering the judgment of the court:

(1) The Second Schedule that came along with the *Gazette* Notification No 760 of the forest reserve at Bukit Bediri listed down the rights and privileges and the conditions imposed on their exercise within that forest reserve. The conditions clearly and in no uncertain terms prohibited the

creation of new *temuda*, even back in the 1930's. No mention was made of *pulau galau* and *pemakai menoa* in the conditions. But the rights conferred to the plaintiffs, who were descendants of permanent residents of the Bukit Bediri forest area, appeared to be quite similar to those practices of *pulau galau* and *pemakai menoa*, to forage for food from the forest produce, by way of hunting for wild animals and by way of fishing in the rivers or streams which run within the forest reserve of Bukit Bediri. In that sense, therefore, the rights of the plaintiffs were statutorily created as distinguished from the claimed NCR practices which would emanate and be recognised, if at all, under the common law. (para 22)

(2) The Bukit Bediri forest reserve was constituted in 1952 and the *Gazette* Notification No 760 was issued under the Sarawak Forest Ordinance 1934 ('SFO 1934'). The SFO 1934 was subsequently repealed and the SFO 1953 came into being. Despite the repeal of the SFO 1934, the applicable provisions must be those contained in the SFO 1934 as the acquired rights were saved and preserved. Since the applicable law is the SFO 1934, the continued operation of the Bukit Bediri forest reserve must be governed by law as it then stood when it was constituted and the terms peculiar to its constitution in the Second Schedule. Therefore, s. 12(2) of the SFO 1934 is relevant. Further, the Notification No 760 as published in the *Gazette*, was never altered, modified or deleted by any subsequent valid notification in the *Gazette*. Hence, the Notification No 760 remained as a valid document. (paras 35, 37 & 41)

(3) Based on the Second Schedule, it was clear that the forest reserve was constituted for the benefit of the permanent inhabitants and the forest reserve as defined in the First Schedule covered an area of approximately 2,458 acres at Bukit Bediri. There was nothing in the Second Schedule that defined the local limits within the 2,458 acres whereby the exercise of such rights is limited. Neither was there any order made by the Director of Forestry ('DOF') which regulated any local limit in respect to the exercise of such rights. In the absence of any such limitation or order specifying a particular local limit within the Bukit Bediri forest reserve, the rights under paras (a) and (b) were exercisable by the plaintiffs over the entire Bukit Bediri forest reserve. (paras 49 & 51)

(4) In respect of other conditions subjecting the exercise of right to hunt game and catch fish to the laws on fishing and hunting, the prohibition of felling of new virgin forest and of planting of new rubber and pepper gardens, such conditions were crucial in achieving the object and purpose of the enactment of the Forests Ordinance 'to provide for the protection and management of the forests of the Colony, and to regulate the taking of forest produce'. It is only if the right holder fails for a continuous period exceeding three years to exercise any such right that

the latter may be annulled permanently. Otherwise, in the absence of any breach of the conditions attached to the admitted rights by the right holder, he is entitled to a quiet and peaceful enjoyment of the rights as stipulated in the Second Schedule. Taken as a whole, the two forests were created for the benefit of the permanent residents of the longhouses in those two forest reserves. The fact that the two forests had conditions attached to their use for the benefit of the said permanent residents was a clear indicator, as provided by the State legislature to the effect that they be controlled and maintained by the DOF, that the creation of a reserve forest did not result in the Government losing all manner of control over the forest reserves. (paras 52-55)

(5) The plaintiffs were in occupation of the forest reserve with certain rights to forage the forest produce within the entire area of the Bukit Bediri Forest Reserve. The plaintiffs were, at all material times, in legal occupation of the forest reserve. *Vide* the Second Schedule, among others, they were allowed, subject to conditions, to forage even in the primary or virgin area of the forest reserve as long as they did not fell trees to create new *temuda*. In the absence of any local limits specified for the exercise of the admitted rights within the forest reserve, and as long as the plaintiffs did not breach any conditions attached, they were entitled to the quiet and peaceful enjoyment of their admitted rights within the entire forest reserve. Therefore, the construction of a rail line within the forest reserve by the timber company, without any valid corresponding steps taken by the State by way of altering the conditions as appeared in the Second Schedule or limiting the exercise of the admitted rights, amounted to a trespass. The plaintiffs' right to sue for trespass could not be denied. The act of trespass is a prohibition under s. 21 of the SFO 1934, which is a provision that criminalises several acts, including trespass, from being conducted within the boundaries of a forest reserve. (paras 59, 65 & 69)

(6) This was a case where the State, having retained control over the forest reserve, had however failed to exercise such control within the scheme as stipulated under s. 12(2) of the SFO 1934. Therefore, although the answer to the sole question pertaining to the retention of control by the State was answered in the affirmative, nevertheless the facts, as they related to the issue of trespass, clearly showed that the defendants had encroached upon the Bukit Bediri forest reserve by constructing the rail line, *albeit* in the virgin jungle within the forest reserve, without the permission of the plaintiffs, expressly or otherwise. That amounted to the actionable tort of trespass. Further, in light of *TR Sandah*, the plaintiffs did not acquire any NCR in respect of the practices of *pulau galau* and *pemakai menoa* in both forests. That part of the decision of the courts below was set aside. (paras 70, 71 & 76)

Bahasa Malaysia *Headnotes*

Defendan pertama adalah syarikat pembalakan berlesen yang diberi kawasan konsesi untuk pembalakan, manakala defendan kedua adalah kontraktor defendan pertama yang menjalankan dan/atau menebang dan mengeluarkan kayu-kayu balak komersial termasuk menebang dan mengeluarkan balak dalam kawasan konsesi tertentu. Plaintif-plaintif, orang asli melalui kaum, iaitu, Iban dari tiga perkampungan berasingan dalam bandar Simunjan, Sarawak, menuntut pada kesemua masa material mereka adalah pemilik sah, penuntut, tanah Hutan Simpanan Kampung yang terletak di/atau sepanjang Sungai Sebangan, Simunjan, Sarawak. Pada atau kira-kira Januari 2006, plaintif-plaintif mendapati defendan pertama dan kedua dan/atau pekerja-pekerja atau ejen-ejen atau kakitangan-kakitangan mereka menceroboh tanah-tanah mereka dengan membina landasan keretapi untuk menjalankan aktiviti-aktiviti pembalakan atas sebahagian tanah mereka mengakibatkan kerosakan serius terhadap alam sekitar, iaitu, kehilangan balak dan pencemaran sistem sungai. Oleh itu, satu aduan dibuat di Pejabat Daerah Simunjan terhadap pencerobohan aktiviti pembalakan dalam kawasan tanah tersebut, tetapi tiada tindakan diambil. Defendan pertama dan kedua enggan berunding dengan plaintif-plaintif atas alasan plaintif-plaintif tiada hak atas tanah yang dituntut plaintif-plaintif. Pada 14 September 2006, plaintif-plaintif membuat sekatan fizikal di Hutan Simpanan Bukit Bediri untuk menghentikan penebangan dan pengeluaran balak di situ dan kemudian, membuat laporan polis, mengadu tentang pencerobohan lanjut oleh defendan pertama dan kedua. Plaintif-plaintif juga menyatakan bahawa sempadan kawasan konsesi menceroboh atas tanah-tanah mereka dan tidak mengendahkan hak plaintif-plaintif dan oleh itu, tidak sah dan terbatal. Plaintif-plaintif kemudian memfailkan tindakan di Mahkamah Tinggi menuntut relief-relief deklarasi berkaitan dengan hak tanah adat plaintif-plaintif terhadap kawasan tersebut, termasuk keperlembagaan lesen pembalakan. Plaintif-plaintif juga menuntut ganti rugi teruk dan teladan dibayar untuk pencerobohan atas tanah mereka. Hakim Mahkamah Tinggi ('HMT') memutuskan berpihak pada plaintif-plaintif dan memberikan terma-terma bahawa: (i) plaintif-plaintif mewarisi hak adat anak negeri ('NCR') atas Hutan Simpanan Bukit Bediri dan Hutan Stika; (ii) pembinaan landasan keretapi melintasi kedua-dua hutan ini membentuk pencerobohan tanah tersebut; dan (iii) defendan-defendan bertanggungan secara bersesama dan berasingan untuk membayar ganti rugi untuk pencerobohan tersebut. Tidak berpuas hati, defendan-defendan ketiga, keempat dan kelima ('perayu-perayu') merayu ke Mahkamah Rayuan. Mahkamah Rayuan menolak rayuan setelah mendapati Jadual Kedua Notis Warta No 760 ('Jadual Kedua') jelas menyatakan hutan simpanan tersebut dibentuk untuk faedah penduduk tetap tujuh rumah panjang yang terletak di situ. Perayu-perayu, oleh itu, memperoleh kebenaran merayu atas tiga soalan undang-undang. Walau bagaimanapun, berikutan keputusan Mahkamah

Persekutuan dalam kes *Director of Forest, Sarawak and Anor v. TR Sandah Tabau And Other Appeals* ('*TR Sandah*'), perayu-perayu mengehadkan rayuan mereka pada hanya satu soalan undang-undang, iaitu, sama ada pengenaan syarat-syarat dalam Jadual Kedua memberi hak pada Negeri mengekalkan kawalan atas kawasan-kawasan selain daripada tanah yang dibersihkan atau *temuda* dalam kawasan Hutan Simpanan Bukit Bediri. Dalam *TR Sandah*, Mahkamah Persekutuan memutuskan bahawa amalan *pulau galau* dan *pemakai menoa* dalam kalangan kaum Iban, walaupun adalah adat, tetapi tidak diiktiraf bawah undang-undang Sarawak. Hanya amalan adat *temuda*, atau membersihkan hutan dara untuk bercucuk tanam diiktiraf dan mempunyai tempoh tamat 1 Januari 1958.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Abang Iskandar HMP menyampaikan penghakiman mahkamah:

(1) Jadual Kedua yang termasuk dalam Notis Warta No 760 untuk hutan simpanan di Bukit Bediri menyenaraikan hak-hak dan keistimewaan-keistimewaan dan syarat-syarat yang dikenakan terhadap pelaksanaan dalam hutan simpanan tersebut. Syarat-syarat tersebut jelas dan dalam terma-terma yang tidak tetap melarang pembentukan *temuda* baru, walau dalam tahun 1930-an. Tiada pernyataan dibuat tentang *pulau galau* dan *pemakai menoa* dalam syarat-syarat tersebut. Tetapi hak-hak yang diberi kepada plaintif-plaintif, keturunan penduduk tetap kawasan hutan Bukit Bediri, jelas agak serupa dengan amalan *pulau galau* dan *pemakai menoa*, untuk mencari makanan daripada hasil hutan, dengan cara memburu binatang buas dan memancing di sungai-sungai yang mengalir dalam hutan simpanan Bukit Bediri. Berkaitan itu, hak plaintif-plaintif dibentuk secara statutori seperti yang dibezakan daripada amalan NCR yang timbul dan diiktiraf, jika ada, bawah common law.

(2) Hutan simpanan Bukit Bediri dibentuk pada 1952 dan Notis *Warta* No 760 dikeluarkan bawah Ordinan Hutan Sarawak 1934 ('Ordinan 1934'). Ordinan 1934 kemudian dimansuhkan dan Ordinan 1953 digubal. Walaupun Ordinan 1934 dimansuhkan, peruntukan-peruntukan terpakai masih terkandung dalam Ordinan 1934 kerana hak-hak yang diperoleh dilindungi dan dikekalkan. Oleh sebab undang-undang yang terpakai adalah Ordinan 1934, operasi berterusan hutan simpanan Bukit Bediri mesti tertakluk bawah undang-undang pada masa hutan simpanan tersebut dibentuk dan terma-terma khusus pembentukannya dalam Jadual Kedua. Oleh itu, s. 12(2) Ordinan 1934 adalah relevan. Selanjutnya Notis No 750 yang diterbitkan dalam *Warta*, tidak pernah diubah, dipinda atau dipotong oleh apa-apa notis sah terkemudian dalam *Warta*. Oleh itu, Notis No 760 kekal sebagai dokumen sah.

(3) Berdasarkan Jadual Kedua, jelas bahawa hutan simpanan dibentuk untuk faedah penduduk-penduduk tetap dan hutan simpanan ditakrif dalam Jadual Pertama meliputi kawasan kira-kira 2,458 ekar di Bukit Bediri.

A Tiada apa-apa dalam Jadual Kedua yang menentukan had tempatan dalam rangkuman 2,458 ekar di mana pelaksanaan hak-hak itu terbatas. Juga tiada apa-apa perintah dibuat oleh Pengarah Perhutanan ('DOF') yang mengawal apa-apa had tempatan berkaitan pelaksanaan hak sedemikian. Tanpa apa-apa had atau perintah sedemikian yang
B menyatakan had tempatan tertentu dalam lingkungan hutan simpanan Bukit Bediri, hak-hak bawah perenggan (a) dan (b) boleh dilaksanakan oleh plaintif-plaintif atas keseluruhan hutan simpan Bukit Bediri.

(4) Tentang syarat-syarat lain berkaitan pelaksanaan hak memburu dan menangkap ikan sehingga undang-undang untuk menangkap ikan dan
C berburu, larangan menebang hutan dara baru dan berkaitan penanaman ladang getah dan lada hitam, syarat-syarat sedemikian penting untuk mencapai tujuan dan niat enakmen Ordinan Hutan 'to provide for the protection and management of the forests of the Colony, and to regulate the taking of forest produce'. Hanya jika pemilik sebenar gagal, untuk
D tempoh berlanjutan melebihi tiga tahun, melaksanakan apa-apa hak sedemikian, ini boleh dibatalkan secara kekal. Jika tidak, tanpa apa-apa pelanggaran syarat-syarat yang disertakan dalam hak-hak yang diterima oleh pemilik hak, dia berhak untuk menikmati hak tersebut dengan aman seperti yang diperuntukkan dalam Jadual Kedua. Secara
E keseluruhannya, kedua-dua hutan tersebut dibentuk untuk faedah penduduk-penduduk tetap rumah panjang dalam kedua-dua hutan simpanan tersebut. Fakta bahawa kedua-dua hutan tersebut mempunyai syarat-syarat yang disertakan untuk kegunaannya untuk faedah penduduk-penduduk tetap adalah petunjuk jelas, seperti yang diperuntukkan oleh perundangan Negeri bahawa mereka dikawal dan
F diselia oleh DOF, bahawa pembentukan hutan simpanan tidak mengakibatkan Kerajaan kehilangan kesemua cara kawalan terhadap hutan simpanan.

(5) Plaintif-plaintif menduduki hutan simpanan dengan hak-hak tertentu untuk mencari hasil hutan dalam keseluruhan kawasan hutan simpanan
G Bukit Bediri. Plaintif-plaintif, pada setiap masa material, menduduki hutan simpanan tersebut secara sah. Melalui Jadual Kedua, antara lain, mereka dibenarkan, tertakluk pada syarat-syarat, untuk mencari, walaupun dalam kawasan utama atau dara hutan simpanan, asalkan
H mereka tidak menebang pokok-pokok untuk membentuk *temuda* baru. Tanpa apa-apa had tempatan menyatakan pelaksanaan hak-hak yang diterima dalam hutan simpanan, dan selagi plaintif-plaintif tidak melanggar apa-apa syarat yang disertakan, mereka berhak menikmati dengan aman hak-hak yang diterima dalam keseluruhan hutan simpanan tersebut. Oleh itu, pembinaan landasan keretapi dalam hutan simpanan
I oleh syarikat pembalakan, tanpa apa-apa langkah sepadan oleh Negeri dengan mengubah syarat-syarat seperti dalam Jadual Kedua atau

mengehadkan pelaksanaan hak-hak yang diterima, membentuk pencerobohan. Hak plaintif-plaintif untuk menyaman untuk pencerobohan tidak boleh dinafikan. Tindakan pencerobohan adalah larangan bawah s. 21 Ordinan 1934, peruntukan yang menjadikan beberapa tindakan adalah jenayah, termasuk pencerobohan, daripada dilaksanakan dalam kawasan hutan simpanan.

(6) Ini adalah kes yang mana Negeri, setelah mengekalkan kawalan terhadap hutan simpanan, walau bagaimanapun gagal melaksanakan kawalan sedemikian dalam skim yang dinyatakan bawah s. 12(2) Ordinan 1934. Oleh itu, walaupun jawapan untuk satu-satunya soalan, berkaitan pengekalan kawalan oleh Negeri, dijawab secara afirmatif, tetapi fakta, setakat yang berkaitan dengan isu pencerobohan, jelas menunjukkan defendan-defendan telah menceroboh hutan simpanan Bukit Bediri dengan membina landasan keretapi, walaupun dalam hutan dara dalam kawasan hutan simpanan, tanpa kebenaran plaintif-plaintif, secara langsung atau sebaliknya. Ini membentuk tort pencerobohan yang boleh diambil tindakan. Selanjutnya, berdasarkan *TR Sandah*, plaintif-plaintif tidak memperoleh NCR berkaitan dengan amalan *pulau galau* dan *pemakai menoa* di kedua-dua hutan tersebut. Bahagian keputusan tersebut oleh mahkamah di bawah diketepikan.

Case(s) referred to:

Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 FC ***(foll)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Henderson v. Foxworth Investments Ltd and Another [2014] 1 WLR 2600 ***(refd)***

Onnasis & Anor v. Vergottis [1968] 2 Lloyds Rep 403 ***(refd)***

Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 CLJ 35 CA ***(refd)***

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC ***(refd)***

Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2015] 3 CLJ 1017 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC

Watt v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)

Interpretation Ordinance 1953 (Sarawak), s. 10(c)

Forest Ordinance 1934 (Sarawak) (since repealed) , ss. 9, 12(2), 15(b), (c), 18, 21, 23, 62

Forest Ordinance 1953 (Sarawak) (Cap 126), ss. 5, 9, 16

Land Code (Sarawak) (Cap 81), s. 5

For the appellant - Mohd Adzrul Adzlan & Emma Mohd Yusri; SLO, Sarawak
For the respondent - Joshua P Baru & Clarice Chan; M/s Baru Bian

[Editor's note: For the Court of Appeal judgment, please see Director Of Forest Sarawak & Ors v. Nicholas Mujah Ason & Ors [2018] 7 CLJ 460 (overruled in part); For the High Court judgment, please see [2012] 1 CLJ 749 (overruled in part).]

Reported by S Barathi

JUDGMENT

Abang Iskandar FCJ:

Preliminary

[1] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Justice Zaharah Ibrahim CJM has since retired. My learned brother Ahmad Hj Maarop PCA, my learned sister Justice Alizatul Khair Osman Khairuddin FCJ and my learned sister Justice Nallini Pathmanathan FCJ had read this judgment in draft and all of them agreed that this judgment be our judgment.

Brief Facts

[2] The plaintiffs are all natives by race, ie, Ibans from three different villages within the town of Simunjan, Sarawak.

[3] Hock Tong Hin Sawmill Co Bhd ("the first defendant") is a licensed timber company that was granted a concession area for the extraction of timber under license No. T/5090 ("the said concession area").

[4] Roundtree Timber Sdn Bhd ("the second defendant") is the contractor of the first defendant in carrying out and/or felling and extracting merchantable timber logs including the felling and extracting the logs within the specified concession area.

[5] The plaintiffs claim that at all material times, they are the rightful owners, claimants, of a communal forest reserved land situated at/or along Sungai Sebangan, Simunjan, Sarawak.

[6] On or about January 2006, the plaintiffs discovered that the first and second defendants and/or their employees or agents or servants had trespassed their lands by building a railway track to carry out logging activities over part of their said lands causing some serious damage to the environment, namely loss of timber and polluting the river system.

[7] Sometime in February 2006, a complaint was lodged with the District Officer Simunjan on the encroachment of a logging activity within the said lands but no action was taken. The first and second defendants refused to negotiate with the plaintiffs on the ground that the plaintiffs have no right over the said land claimed by the plaintiffs.

[8] On 14 September 2006, the plaintiffs caused a physical blockage at the Bukit Bediri Forest Reserve to stop the felling and extracting of the timber therein.

[9] A police report was made by the plaintiffs on 9 November 2006 at Sebuyau Police Station, complaining of further encroachment by the first and second defendants.

[10] The plaintiffs also claimed that the boundary of the said concession area had encroached onto their said lands and had disregarded the plaintiffs' rights and therefore bad in law and void.

[11] On 4 July 2007, this action was filed in the High Court ("the HC") sitting at Kuching, wherein the plaintiffs claimed for declaratory reliefs in respect of the plaintiffs' native entitlement to the said area, including the constitutionality of the timber license. The plaintiffs also claimed for aggravated and exemplary damages to be paid for the alleged trespass to their land.

Findings Of High Court

[12] Having heard the evidence adduced before her, the learned High Court Judge ("the HCJ") had ruled in favour of the plaintiffs, and granted the plaintiffs the following terms, together with costs:

(i) The plaintiffs have inherited native customary rights ("NCR") over Bukit Bediri Forest Reserve and Stika Forest, the boundaries of which as delineated and shown in maps produced by the Forestry Department Sarawak and Land and Survey Department Sarawak appearing at pp. 1 and 2 of exh. D4.

(ii) The construction of the rail line across these two forests constituted an encroachment and a trespass of the said land.

(iii) The defendants are jointly and severally liable to pay damages to be assessed by the Deputy Registrar, to the plaintiffs (except those from Kampung Stika who have been earlier compensated) for the said trespass.

[13] Dissatisfied with the decision of the HCJ, the third, fourth, and fifth defendants had appealed against the said decision to the Court of Appeal ("COA").

In The Court Of Appeal

[14] The COA, having heard submissions had unanimously found that there was no merit in the appeal and thus, dismissed it with costs. The decision of learned High Court Judge was duly affirmed.

[15] In finding so, the learned COA judges were of the view that the Second Schedule of Gazette Notification No. 760 ("the Second Schedule") expressly states that the forest reserve is constituted for the benefit of the permanent

inhabitants of the seven longhouses stated therein. In addition, 20 persons are listed as persons that shall have the right to retain possession of rubber and pepper gardens planted prior to the constitution of the forest reserve. The rights, as stated in paras. (a), (b) and (c) of the Second Schedule, are generally for the inhabitants to take forest produce, hunt game and catch fish and to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve, respectively. Those rights have been inherited by the plaintiffs. The encroachment and the logging activities of the timber companies have destroyed the plaintiffs' sources of livelihood, the destruction of their rubber gardens, farm land, old settlement sites with orchard gardens, burial grounds, sacred sites and valuable trees. The encroachment and logging activities had also caused erosion to the plaintiffs' land and polluted their rivers.

[16] The learned COA judges also found that there was no outright rejection of the establishment of the plaintiffs' NCR by foraging for food in the jungle. In any event, para. (a) and (b) of the Second Schedule clearly provide for the plaintiffs to take timber, to hunt game and catch fish in the forest reserve, which was consistent with the plaintiffs' custom of pulau galau and *pemakai menoa*. There was no appealable error on the part of the HCJ in making the first order.

[17] In respect of trespass or encroachment by the reason of the construction of the rail line, the COA judges found that there was no appealable error on the part of the HCJ in her finding that the rail line had been built right across Stika Forest and had traversed part of the Bukit Bediri Forest Reserve. Notwithstanding that the rail line was built over swampy lands, the encroachment had interfered with the plaintiffs' livelihood as the plaintiffs could still carry out activities on and derived benefits from the swampy land. Furthermore, apart from the fact that approval was given for the construction of the rail line, there was no other evidence adduced to show that, pursuant to the approval, the third defendant had issued any direction or order that the exercise of the plaintiffs' subsisting rights be limited.

[18] Dissatisfied with the decision of the COA, the third to fifth defendants proceeded their appeal to the Federal Court. They were granted leave to appeal to this court on 17 May 2017 on the following questions of law:

(i) whether the COA's decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 that the rights of the native are confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak.

(ii) Whether the alleged practice of Iban to preserve an area of jungle or forest as "*pulau*" for access for food, wildlife and forest produce, give rise to exclusive rights to the land in the "*pulau*".

(iii) Whether the imposition of conditions within the Second Schedule of *Gazette* Notification no. 760 entitles the State to retain control over areas other than cleared land or "*temuda*" within the Bukit Berdiri Forest Reserve.

(iv) If the answer to question (iii) is in the affirmative, whether any NCR can be created within reserved land like forest reserve under the control of the State.

This Appeal

[19] We heard this appeal on 18 March 2019. During his oral submissions, the learned State Legal Officer ("the SLO"), representing the third to fifth defendants in this appeal indicated to us that they were proceeding only on question of law captured as no. (iii) namely:

> Whether the imposition of conditions within the Second Schedule of *Gazette* Notification No. 760 entitles the State to retain control over areas other than cleared land or '*temuda*' within Bukit Bediri Forest Reserve.

[20] It would be pertinent to however remind ourselves, that the other allowed questions have been, which had since been withdrawn by the third to fifth defendants at the eleventh hour. Of significance had been question (i) which relates to the question pertaining to the claimed NCR of *pulau galau* and *pemakai menoa*. But it is quite apparent that the answer to that question had been provided by the Federal Court in the case of *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1; [2017] 2 MLJ 281 ("the *TR Sandah* case") which by majority had decided that the above-named practices among the Ibans, although admittedly customary, are nevertheless not recognised under the law of Sarawak. Only the customary practice of *temuda*, or clearing of virgin forest jungles for cultivation is recognised and that has a cut-off date of 1 January 1958. It must be on that consideration, we would gather, that the questions that would have impact on that issue, had been withdrawn by the third to fifth defendants. There were no objections from the plaintiffs.

[21] As such, the net result of the decision of *TR Sandah* case (*supra*) on the claims of the plaintiffs must be that their claims for NCR for those rights which are usufructuary in nature, would have to fail. Indeed, in light of the decision in the *TR Sandah* case (*supra*), *albeit* a split one, the position taken by the plaintiffs to premise their claim for NCR could not stand, which decide that the practices of *pulau galau* and *pemakai menoa*, though customary, are not recognised under the law of Sarawak.

[22] But, that would not completely dispose of this appeal for the simple reason that the rights of the plaintiffs in this case were founded upon a conferment of statutory rights by the third to fifth defendants to the plaintiffs by the former constituting a forest reserve over the Bukit Bediri forest area. The Second Schedule that comes along with the *Gazette* Notification No. 760 of the forest reserve at Bukit Bediri lists down the rights and

privileges and the conditions imposed on their exercise within that forest reserve. It must be borne in mind that the conditions clearly and in no uncertain terms prohibited the creation of new *temuda*, even back in 1930's. No mention was made of *pulau galau* and *pemakai menoa* in the conditions. But the rights conferred to the plaintiffs, who were descendants of permanent residents of the Bukit Bediri forest area, appeared to be quite similar to those practices of *pulau galau* and *pemakai menoa*, to forage for food from the forest produce, by way of hunting for wild animals and by way of fishing in the rivers or streams which run within the forest reserve of Bukit Bediri. In that sense, therefore, the rights of the plaintiffs are statutorily created as distinguished from the claimed NCR practices which would emanate and be recognised, if at all, under the common law.

[23] Hence, the concern on the part of the third to fifth defendants from the decisions of the courts below, the State Authority would appear to have lost all manner of control over the forest reserve at Bukit Bediri by it imposing conditions upon the rights conferred upon the plaintiffs, as appear in the Second Schedule. In other words, regardless of the true nature of the plaintiffs' rights in the forest reserve, the extent of the State Government's control in the forest reserve remains a live issue. Thus, through question (iii), the third to fifth defendants were desirous of ascertaining whether the State still retained control over the forest reserve having imposed the conditions as it did.

[24] The answer to question (iii) will then be applied to the factual matrix as found by both the courts below to determine whether the defendants were correctly found liable for the tort of trespass. As such, two issues were germane before us, namely, (1) whether the State retained control over the forest reserve ("the leave question (iii) issue"), and (2) whether on the evidence as adduced before the HC, the finding by the HCJ, which was affirmed by the COA, that the defendants were liable for trespass, was justified.

[25] Reverting therefore to question (iii), the learned SLO submitted before us that the decisions of the HC, as well as that of the COA in favor of the plaintiffs, being the respondents in this appeal, having had acquired NCR over the entire Bukit Bediri Forest Reserve and proposed Stika Communal Reserve, are in error. Such decisions were at odds with the provisions of the Sarawak Forest Ordinance 1953, Cap. 126 ("SFO 1953"), namely s. 9. The effect of such decisions had taken away the controlling powers of the conservator and had rendered the provisions of the SFO 1953, in relation to the conservator's control over forest reserve, nugatory. That would, as further submitted by learned SLO, go against the presumption that the Legislature does nothing in vain. The case of *Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2015] 3 CLJ 1017; [2016] 1 MLJ 200 was cited in support thereof.

[26] It was submitted before us that s. 9 of the SFO 1953 only grants limited rights or privileges over forest areas within the forest reserve. Activities such as foraging is still regulated and controlled by the conservator. If the plaintiffs had established customary rights over the entire forest reserve as decided by the COA, then this section would have the effect of impairing or abridging such powers of the State.

[27] For ease of reference, we reproduce s. 9 of SFO 1953, as below:

> 9(1) When a right is admitted or a privilege conceded in respect of forest produce within a forest proposed for reservation, the quantity and nature of such forest produce which may be taken or received shall be stated.
>
> (2) The exercise of any right or privilege shall be subject to the control of the Conservator and to such orders as he may make to regulate the local limits within which and the mode on which the right or privilege may be exercised.

[28] Looking at the *Gazette* Notification No. 760, the plaintiffs were entitled to forage or harvest the forest produce in those areas subject to the express conditions, but they are not entitled to create NCR over the land in the two areas.

[29] So to answer question (iii) we need to have a look at the *Gazette* Notification no. 760 for the Bukit Bediri Forest Reserve which was marked as exh. 01 during the course of trial in the HC. We reproduce it below:

> No. 760 - FORESTS ORDINANCE.
>
> Cap. 31. In exercise of the powers conferred on him by section 12 of the Forests Ordinance, the Chief Secretary hereby constitutes, with effect from 1st June, 1952, the land enclosed within the boundaries described in the First Schedule hereto a Forest Reserve subject to the rights conceded and special conditions attached specified in the Second Schedule hereto.
>
> FIRST SCHEDULE.
>
> Name: Bukit Bediri Forest Reserve.
>
> Division: First.
>
> District: Simunjan.
>
> Area: 2,458 acres approximately.
>
> Boundaries: Commencing from Land and Survey peg at the mouth of Sungei ljok the boundaries follow cut lines bearing 77 and distance 8510 links, 120° and 4120 links, 100° and 910 links, 160° and 1600 links, 249° and 6620 links, 159° and 3220 links, 189° and 6420 links, 200° and 1350 links, 252° and 1440 links, 244° 15' and 6680 links, 184° and 3740 links, 101° and 5400 links, 127 and 4020 links, 65° and 8470 links, 111° 15' and 4200 links, 131° and 3210 links to the mouth of Sungei Entangor. The boundary then follows the true right bank of Sungei Sebangan for approximately 8 miles downstream to the mouth of Sungei ljok the point of commencement.

Bearings and distances are approximate and the demarcated boundaries shall be deemed to be correct.

SECOND SCHEDULE

The Forest Reserve is constituted for the benefit of the permanent inhabitants of the following long houses, who shall have the rights:

(a) to take timber, poles, fuel, rattan and other climbers, bamboo, damar, fruit, honey, beeswax and ataps for their own domestic use and for boat-building but not for sale or barter, provided that the quantity of, and the place and manner of collection of such forest produce shall be subject to the control of the Conservator of Forests; and

(b) to hunt game and catch fish, provided the exercise of this right shall be subject to the provisions of the laws of Sarawak relating to hunting and fishing.

(c) to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve on condition that no more virgin forest is felled.

All Sea-Dayaks under Penghulu Berong in the following long-houses:

1. Rumah Penghulu Berong.
2. Rumah Jenta.
3. Rumah Ranggu.
4. Rumah Anggat.
5. Rumah Apau.
6. Rumah Jap.
7. Rumah Mail.

In addition the following persons shall have the right to retain possession of rubber and pepper gardens as stated hereunder, planted prior to the constitution of the forest reserve on condition that no new planting is made.

Name	Rubber garden	Pepper vine
1 Penghulu Berong	10 acres approx	300
2 Rangga anak Gindi	2 „ „	-
3 Engkabang ak Bakol	2 „ „	-
4 Koyol anak Beran	3 „ „	-
5 Limbun anak Sadal	2 „ „	-
6 Bakit anak Tukoh	2 „ „	450
7 Tikong anak Janting	4 „ „	-
8 Jayan anak Manggai	5 „ „	400

9	Randi anak Ngan	4	„	„	100
10	Leman anak Randong	3	„	„	200
11	Chuat anak Koyol	4	„	„	150
12	Layang anak Leman	4	„	„	300
13	Bayang anak Tikong	2	„	„	-
14	Subong anak Randong	2	„	„	„
15	Jap anak Berong	-			200
16	Kawi anak Berong	-			200
17	Seman anak Gesi	-			350
18	Luchi anak Mawang	-			100
19	Bugon anak Gesi	-			150
20	Anchot anak Gesi	-			150

J. H. ELLIS,
Acting Chief Secretary.

[30] We also now reproduce the proposed notification for Stika as follows:

PROPOSED STIKA COMMUNAL FOREST

(C. F. 4)

PROCLAMATION

PROPOSAL TO CONSTITUTE A COMMUNAL FOREST

PROCLAMATION by the Resident First Division, Sarawak, under section 41 of the Forest Ordinance, 1953.

To all persons concerned, notice is hereby given:-

1. That it is proposed to constitute the area described in the Schedule hereto a Communal Forest under section 45 of the Forest Ordinance, 1953.
2. That all persons interested in the area described in the Schedule hereto, or in any produce thereof, are required to claim any right in or over any land within the said area, before the 30th August, 1961; that such claims must be made in writing to the District Officer at Simunjan; and that they must specify the nature of such right or claim.

SCHEDULE I

Name : Stika Communal Forest

Division : First

District : Lower Sadong

Area : 4188 acres approximately

Boundaries: Commencing at Kuala Sungei Stika, the boundary follows the true right bank of Sungei Stika for approximately 7300 links, thence along od Sungei Stika for 256° for 6500 links; thence along the eastern cut-line boundary of the Sedili Forest Reserve for 16500 links meeting Kuala Sungei Blanga, thence along the true right bank of Sungei Sebangan upstream until the boundary reaches the mouth of Sungei Entangor. The boundary then follows a series of cut-lines bearing 311° for 3210 links; 291° 15' for 4200 links; 245° for 8470 links; 307° for 4020 links; 281° for 5400 links; 4° for 3740 links; 64°15' for 6680 links; 72° for 1440 links; 20° for 1350 links; 9° for 6420 links; 339° for 3220 links; 300° for 4120 links and 257° for 8510 links meeting the mouth of Sungei ljok; thence downstream along the true left bank of Sungei Sebangan back to the point (...)

Note: Bearings and distance are approximately only and the demarcated boundaries shall be considered correct.

SCHEDULE II

The Communal Forest is constituted for the benefit of the permanent inhabitants of the Long House listed below, who shall have the rights:

(a) to take forest produce for their own use, and not for sale or barter;

(2)

(b) to exercise rights in hunting and fishing over the area;

(c) to continue to farm in old "*temuda*" and to maintain existing rubber and pepper gardens but no virgin forest shall be felled in the Communal Forest.

1. Rumah Penghulu Berong
2. Rumah Jenta
3. Rumah Ranggau
4. Rumah Anggat
5. Rumah Apau
6. Rumah Jap
7. Rumah Mail

Date 17 May 1961

...
Resident, First Division

[31] The two forest reserves were created for the benefit of the permanent residents of the two affected areas. Both areas were carved out as such, subject to the express conditions as stipulated therein. It was not an outright grant without any conditions. In other words, granted that the plaintiffs were lawfully in occupation in the respective forest reserves, they were there under licence with the State Authority's permission to do things subject to

conditions. In other words, they are persons in the contemplation of s. 5 of the Sarawak Land Code ("SLC"). The plaintiffs were recognised as licensees under clear provisions of the SLC, except of course, for the old *temuda* within the said two forest reserves.

[32] As such, the net effect of the two documents are, according to the third to fifth defendants as follows: [1] that existing *temuda* is recognised and could be continuously worked on. There will be no creation of new *temuda* by felling trees in virgin forest within the demarcated areas; [2] the permanent inhabitants of listed longhouses were allowed to forage for food within the demarcated forests; [3] there was no total abdication of control of the usage of other activities by other persons within the demarcated forest areas. In other words, learned SLO had urged this court to answer the leave question (iii) in the affirmative, meaning, that the State retain control over Bukit Bediri Forest Reserve.

[33] For the plaintiffs, in respect of the issue that had pertained to question no. (iii) it was submitted that [1] from the plain reading of the *Gazette*, the Second Schedule does not in any manner of form give control of the land to the State. In fact, the Second Schedule does not restrict or limit the existence of the plaintiffs' rights, but only regulates how certain types of activities, which are being exercised over the acknowledged NCR are to be carried out. There is nothing according to learned counsel for the plaintiffs, in the Second Schedule that warrants the State to limit or regulate the nature and extent of the plaintiffs' rights. [2] that it would be paradoxical to conclude that the Second Schedule of the *Gazette* or the proposed Communal Forest *Gazette* would allow the nature and extent of the rights of the plaintiffs be regulated and limited by the said *Gazette* and the Forests Ordinance when the forests reserve itself were 'constituted for the benefit of the permanent inhabitants' of the longhouses named therein. It is submitted that what the conditions only proposed to do is to ensure the manner the activities carried out by the inhabitants adhere to the laws of the State.

[34] Based on the above submissions, learned counsel for the plaintiffs had urged upon us to conclude that the question no. (iii) be answered in the negative, namely that the State had not retained control or in other words, had lost control, and then to further rule that NCR of *pulau* and *pemakai menoa* can be created within a forest reserve.

Our Deliberations And Findings

[35] Before proceeding further, it must be stated here that the applicable law ought to be the Sarawak Forest Ordinance 1934 ("SFO 1934") (Cap. 31), not the SFO 1953. This is because the Bukit Bediri Forest Reserve was constituted in 1952 and the *Gazette* Notification no. 760 was issued under SFO 1934. The SFO 1934 was subsequently repealed and the SFO 1953

came into being. Despite such a situation, the applicable provisions must be those contained in the SFO 1934. Although SFO 1934 was repealed, the acquired rights are saved and preserved. Section 10(c) of Interpretation Ordinance 1953 provides as follows:

> The repeal of any written law shall not:
>
> (a) ...
>
> (b) ...
>
> (c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed;

[36] Indeed, the conditions set out in (a) and (b) in the Bukit Bediri Forest Reserve clearly subject the use of the reserve forest to the SFO 1934 and the Mining Ordinance, among others. The conditions regulating the rights to forage and hunt in the two reserve forests are statutorily based. The *Gazette* remained in force, and was never degazetted. The State's control had remained intact and was never superseded by any acquisition or creation of NCR as claimed by the plaintiff. The interplay between the exercise of the right and the control by the Director of Forestry ("DOF") was captured under s. 12(2) of the SFO 1934. The control by the State *via* the DOF was clearly retained, as could be seen in the various *indicia* of such elements of control, *albeit* it being one which is not absolute.

[37] By way of reiteration, suffice to state here that since the applicable law is the SFO 1934, the continued operation of the Bukit Bediri Forest Reserve must be governed by law as it then stood when it was constituted and the terms peculiar to its constitution in the Second Schedule. In that regards, therefore, s. 12(2) of the SFO 1934 is relevant for our consideration.

[38] Section 12(2) of the SFO 1934 provides as follows:

> FORESTS
>
> 12 - (1) When the period fixed under section 5(3) has elapsed and all objections and claims, if any, have been disposed of and all lands, if any, to be included in the forest proposed for reservation have been acquired by the Chief Secretary under section 10, the Chief Secretary shall publish in the Government *Gazette* a notification which shall:
>
> (i) specify the limits of the forest it is intended to reserve;
>
> (ii) declare the same to be reserved from the date fixed by such notification;
>
> (iii) state the rights admitted and privileges conceded in respect of the said forest; and
>
> (iv) State the special conditions, if any, governing the reservation thereof.

(2) From the date so fixed, such forest shall be a forest reserve and shall, together with all the produce thereof and things found therein, be deemed to be the property of the Government, and shall be maintained and controlled by the Director of Forestry, subject to the rights, privileges, and conditions, if any, stated in such notification.

[39] This would invariably include the land, the trees, the forest produce and the fishes in the swampy areas that may exist in such a forest. In that regard, the use of the word 'things' in that sub-section clearly serves its purpose. But what would follow is at the centre of our present discourse. It goes on to provide that such forest shall be controlled and maintained by the DOF, subject to the rights, privileges and conditions, if any, stated in such notification.

[40] Nevertheless having said that, as alluded to by us earlier, the control of the State over the forest reserve may not be absolute. It would depend on how the conditions that are attached to the forest reserve are being couched. We think that the learned SLO realised this. Thus, the remaining question that is left for us to answer is the extent to which the State retained, if at all, control over the forest reserve at Bukit Bediri.

[41] In this case, the Notification No. 760 as published in the *Gazette*, was never altered, modified or deleted by any subsequent valid notification in the *Gazette*. Hence, the Notification No. 760 remains as a valid document.

Control And The Meaning Of The Attached Conditions

[42] To recap, as stated in the Second Schedule in the *Gazette* Notification No. 760, the permanent inhabitants had the right to the use and taking of the forest produce as in para. (a), to hunt game and catch fish as in para. (b) and to *temuda* as in para. (c). Specific individuals were also acknowledged of the rights to retain possession of rubber and pepper gardens planted prior to the constitution of the forest reserve.

[43] However, the exercise of the admitted rights within the Bukit Bediri Forest Reserve is tied with the following conditions:

(a) The prohibition of sale or barter in the taking and collection of natural resources which are for domestic use and for boat building only. Accordingly, the quantity, manner and place of collection be subject to the control of the conservator of forests;

(b) The hunting and fishing are subject to the laws relating to such activities;

(c) The prohibition of felling of new virgin forest; and

(d) The prohibition of planting of new rubber and pepper gardens.

[44] Paragraph (a) concerns the exercise of rights in respect of forest produce within a forest reserve. This is governed specifically under s. 9 of the SFO 1934 which states as follows:

> Section 9:
>
> (1) When a right is admitted or a privilege conceded in respect of forest produce within a forest proposed for reservation of a forest reserve, the quantity and nature of such forest produce which may be taken or received shall be stated.
>
> (2) The exercise of such right or privilege shall be subject to the control of the Director of Forestry, and to such orders as he may make to regulate the local limits within which, and the mode in which, such forest produce may be taken within the forest reserve.

[45] Clearly, s. 9 of the Ordinance mandated not only the statement of quantity and nature of forest produce that may be taken but also confined the exercise of such rights to the control of the DOF who shall regulate the local limits and the mode of taking the forest produce within the forest reserve.

[46] In this respect, it is pertinent to state here that any failure of the right holder to submit to such control or to abide by any order made under this provision may result in the annulment of any such right either permanently or for a stated period. This may be undertaken by the chief secretary after such inquiry as may be deemed necessary through a notification in the Government *Gazette* (s. 15(b)).

[47] By comparison, we must also state that even in Cap. 126, s. 16 provides that the exercise of the subsisting rights shall be subject to the control of the conservator. The conservator may make order or direction in regulating the limit or area within a forest reserve for the exercise of such rights including the mode of exercising thereof.

[48] Upon a close scrutiny and analysis of the Second Schedule, we find that except for the mode of taking the forest produce, the local limits within which the forest produce may be taken is absent. This is rather significant and has consequences in the context of the circumstances pertaining to the facts surrounding this case.

[49] What we can gather from the Second Schedule is that 'the forest reserve is constituted for the benefit of the permanent inhabitants' and the said forest reserve as defined in the First Schedule covers an area of 2,458 acres approximately at Bukit Bediri. There is nothing in the Second Schedule that defines the local limits within the 2,458 acres whereby the exercise of such rights are limited. Neither was there any order made by the DOF that was brought to the court's attention which regulates any local limit in respect to the exercise of such rights.

[50] This aspect is important because the question for the Federal Court's determination concerns areas other than the cleared land or *temuda*. It is within these primary uncleared forests that the exercise of rights for taking the forest produce as at para. (a) and to hunt game and catch fish at para. (b) are admitted.

[51] Hence, we are of the view that in the absence of any such limitation or order specifying a particular local limit within the Bukit Bediri Forest Reserve that the rights under para. (a) and (b) are exercisable by the plaintiffs over the entire Bukit Bediri Forest Reserve.

[52] In respect of other conditions subjecting the exercise of right to hunt game and catch fish to the laws on fishing and hunting, the prohibition of felling of new virgin forest and of planting of new rubber and pepper gardens, we are of the view that such conditions are crucial in achieving the object and purpose of the enactment of the Forests Ordinance 'to provide for the protection and management of the forests of the Colony, and to regulate the taking of forest produce'.

[53] It is only if the right holder fails for a continuous period exceeding three years to exercise any such right that the latter (the right) may be annulled permanently (s. 15(c)).

[54] Otherwise, in the absence of any breach of the conditions attached to the admitted rights by the right holder, he is entitled to quiet and peaceful enjoyment of the rights as stipulated in the Second Schedule.

[55] Taken as a whole, the two forests were created for the benefit of the permanent residents of the longhouses in those two forest reserves. The fact that the two forests have conditions attached to their use for the benefit of the said permanent residents was a clear indicator, as provided by the State Legislature to the effect that they be controlled and maintained by the DOF, that the creation of a reserve forest did not result in the Government losing all manner of control over the forest reserves.

[56] It is with that in the background that the issue of trespass ought to be viewed and appreciated.

Trespass

[57] We now proceed to consider the issue of whether the court below were justified in coming to the conclusion and findings that the third to fifth defendants were liable jointly and severally for the commission of the actionable tort of trespass against the plaintiffs. The tortious act in which the plaintiffs are claiming compensation for is the tort of trespass, an action which is actionable *per se* based on interference with the possession of land, not necessarily with the ownership of it (see generally the *Halsbury Law of Malaysia*; *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515).

[58] This court has, in the case of *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42; [2019] 1 MLJ 1 defined trespass in the following terms: "Put simply, trespass onto land is the unlawful direct and immediate interference with the possession of land which is in the possession of another person, or which another person is entitled to possession of ..."

[59] It must be stated at the outset that the plaintiffs were in physical possession of the forest reserve where they have been living even before the constitution of the forest reserve by the State Authority pursuant to SFO 1934. Their right to sue for trespass therefore could not be denied. The defence erected by the defendants was not so much that the plaintiffs had no *locus standi* to sue, but rather that they were constructing the rail line pursuant to a written permission issued to them by the purported relevant State Authority. The tortious act in which the plaintiffs are claiming compensation for is the tort of trespass. The act of trespass is a prohibition under s. 21 of the SFO 1934, which is a provision that criminalises several acts, including trespass, from being conducted within the boundaries of a forest reserve.

[60] An act of trespass within a forest reserve is made an offence which is punishable under s. 62 of the SFO 1934. The saving clause however is provided under s. 23 of the SFO 1934 which does not prohibit or render punishable the acts done in any of the following:

(i) The taking of forest produce in accordance with s. 9 of the admitted rights (this covers those permanent inhabitants named in the Second Schedule); or

(ii) The exercise of any right created by grant or contract in writing under s. 18 (the contract in writing under s. 18 must be made by the Governor and not the Director of Forestry); or

(iii) Any act done with the permission in writing of the Director of Forestry; or

(iv) The taking of forest produce according to Part IV of the Ordinance.

[61] Taking into account the above provisions in its entirety, we found that the language employed under s. 23, read together with ss. 21 and 62 define the 'criminal' aspect dealt with under the SFO 1934.

[62] Having said that however, we are of the considered view that, even if there was such a permission in writing by the DOF, such permission would only be a legitimate defence if it is pertaining to a criminal prosecution for trespass. As provided above, the exceptions under s. 23 of the SFO 1934 could well be used to exonerate one from criminal liability.

[63] As such, taken alone, without a corresponding change in the conditions pertaining to the rights of the plaintiffs to forage which covers the entire forest reserve at Bukit Bediri, that written permission could not, with respect, afford a ready defence against a claim for trespass in a civil action, such as the plaintiffs' present civil claim for trespass.

[64] Even if we consider that a contract in writing may be entered into with any company with respect to any act in the forest reserve under s. 18 of Cap. 31, that contract in writing must be made by the Governor, or, in the word of Cap. 126, 'contract made by the Government.' The word used in both legislations is the 'Governor' and 'Government' and not by the 'director'. There was nothing of that sort of evidence led before the HC in this case.

[65] The question posed for our determination in this appeal involves those primary uncleared forest within which rights are exercisable under paras. (a) and (b) of the Second Schedule. From our reading of those paragraphs, these rights are of usufructuary and communal in nature. The right to forage is akin to a usufructuary right, a right under the civil law system where a person may benefit from the use of another's property for as long such use does not damage or change the character of the said property that is being used. An example would be to use another's river water to generate energy but the ownership of the water itself is not impacted. The *Merriam Webster Dictionary* defines the term 'usufructuary right' as the legal right of using and enjoying the fruits or profits of something belonging to another. In this case, there was no dispute that the plaintiffs were in occupation of the forest reserve with certain rights to forage the forest produce within the entire area of the said Bukit Bediri Forest Reserve. The plaintiffs were at all material times, in legal occupation of the forest reserve. *Vide* the Second Schedule, among others, they were allowed subject to conditions, to forage even in the primary or virgin area of the forest reserve as long as they did not fell trees to create new *temuda*.

[66] Premised upon the above, as there was no condition imposed on the exercise of those rights of the plaintiffs as to local limits within which confines inside the forest reserve of Bukit Bediri, when the Second Schedule was published in the *Gazette* Notification No. 760, the only reasonable inference to be gathered from such deliberate omission must be that the plaintiffs were uninhibited to exercise their rights anywhere within the demarcated area of the forest reserve. That inference becomes the more irresistible given the fact that when permission was purportedly given to the timber companies to construct a rail line traversing the forest reserve of Bukit Bediri and the Stika forest, no corresponding action was taken to notify the plaintiffs of the same, by way of amending the conditions as to the exercise of their rights in the Bukit Bediri Forest Reserve. In the absence of the above, the undisputed act of encroachment by the defendants was indeed a trespass

upon the forest reserve, which was actionable at the instance of the plaintiffs. At this juncture, suffice it is for us to state there exists ample evidence upon which both the courts below had found as established, that the virgin jungle where the rail line was constructed had forest produce such as 'asam payak' and fish resources like catfish, which the plaintiffs could potentially forage in exercise of their rights as enumerated under the Second Schedule. Again, by way of reiteration, as long as the plaintiffs did nothing to not comply with the conditions on the exercise of their rights as enumerated in the Second Schedule, they were entitled to the quiet and peaceful enjoyment of their rights in the forest reserve of Bukit Bediri. The unsolicited encroachment by the defendants' construction of the rail line was clearly an act of trespass, for which the plaintiffs were entitled to damages as compensation, from the defendants.

Conclusion

[67] The State's entitlement to retain control over the forest reserve and its produce and things found therein is not to be determined by the existence or non-existence of the 'imposition of conditions' attached to the admitted rights in the Second Schedule of the *Gazette* Notification No. 760. Such determination is to be assessed according to the provisions under s. 12 of the SFO 1934 where the said Notification No. 760 was made under.

[68] In so much as the State retains control, the nature and extent of such control relates only in so far as the protection and management of the forests and the regulation of the taking of forest produce is concerned, and not to the infringement of the admitted rights, communal and/or usufructuary rights exercisable within the areas of the forest reserve as provided for in the Second Schedule. Hence, the nature of control retained by the State is circumscribed in light of the rights admitted and conditions attached as enumerated in the Second Schedule of Notification No. 760.

[69] In the absence of any local limits specified for the exercise of those admitted rights within the forest reserve, and as long as the plaintiffs do not breach any conditions attached, they are entitled to the quiet and peaceful enjoyment of their admitted rights within the entire forest reserve. Therefore, the construction of a rail line within the forest reserve by the timber company, without any valid corresponding steps taken by the State by way of altering the conditions as appear in the Second Schedule or limiting the exercise of the admitted rights, had amounted to a trespass.

[70] In essence therefore, this has been a case where the State having retained control over the forest reserve, had however failed to exercise such control within the scheme as stipulated under s. 12(2) of the Forests Ordinance 1934. We think that the COA was right when it stated as follows:

> [50] Further, apart from the fact that approval was given for the construction of the rail line, there is no other evidence adduced to show that pursuant to the approval, the Director of Forests had issued any

direction or order that the exercise of the plaintiffs' subsisting rights be limited. In other words, there is no evidence to show that upon the issuance of the timber licence and/or the approval of the rail line, the rights of the seven longhouses and the 20 persons are subject to any other conditions imposed by the Director of Forests apart from the conditions already expressed in the Second Schedule of *Gazette* Notification No. 760. [Per Tengku Maimun JCA (as she then was)].

[71] Premised upon the above, we are of the unanimous and respectful view, that although the answer to the sole remaining question (iii) pertaining to the retention of control by the State is answered in the affirmative, meaning to say that the State did retain control despite attaching the conditions, nevertheless the facts, as established in this appeal, as they related to the issue of trespass, had shown clearly that the defendants had encroached upon the Bukit Bediri Forest Reserve by constructing the rail line, *albeit* in the virgin jungle within the forest reserve, without the permission of the plaintiffs, expressly or otherwise. That had amounted to the actionable tort of trespass. The findings of the HC on this issue, and which were subsequently affirmed by the COA, had been findings which were supported by the evidence as adduced before it.

[72] We could not find any cogent reason as to why such concurrent findings of facts on trespass by both courts below ought to be disturbed by us. We agreed with the findings of facts made by the HCJ. She was entitled to come to her inferences and the fact that we may come to our own different inferences from her, is not in itself, a good and valid ground for us to disturb her various findings, which to our minds, were supported by the evidence. Of course there is a big caveat there, in that such an inference so reached must not be so perverse, that no reasonable person so circumstanced would have come to such conclusion in making such inference. Suffice for us to say here that we did not find the HCJ's findings to be perverse. Absent that perverse finding by the learned HCJ, her decision is entitled to its due deference from the appellate court. (See generally *Onnasis & Anor v. Vergottis* [1968] 2 Lloyds Rep 403).

[73] Only in a case where it has been shown to the satisfaction of the appeal tribunal that the impugned decision has been one that is plainly wrong, would the appeal tribunal weigh in and invoke its appellate power in order to right a wrong decision in plain sight. The well-entrenched principle on appellate intervention of a trial court's decision has been consistently applied by the appellate courts and was reiterated by the apex court in the case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441. In citing *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, the apex court also adverted to the case of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, where it was stated that "a plainly wrong decision happens when the trial

court is guilty of no or insufficient judicial appreciation of the evidence." The English House of Lords' decision in the case of *Watt v. Thomas* [1947] AC 484 was cited, *inter alia*, in support thereof. In fact, as relatively recently as in 2014, the English Supreme Court in *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600 ("the *Henderson's* case") considered and explained the 'plainly wrong' test as follows:

> 62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. **What matters is whether the decision under appeal is one that no reasonable judge could have reached**.
>
> (emphasis added).

[74] At the risk of being repetitive, we were not convinced that the courts below had been plainly wrong in coming to their decision on these issues of control and trespass.

[75] In the upshot therefore, upon considering the submission and evidence on the narrow and limited latitude provided, pertaining to question (iii) only, we are of the considered view that the answer to that leave question (iii) must be in the affirmative. In other words, the State retained control in the Bukit Bediri Forest Reserve.

[76] We therefore allow this appeal in part. In light of the *TR Sandah* decision (*supra*), the plaintiffs did not acquire any NCR in respect of the practices of *pulau galau* and the *pemakai menoa* in both forests. That part of the decision of the courts below is set aside.

[77] However, we dismiss the appeal of the third to fifth defendants in respect of the part of the decisions of the courts below that had entered judgment against them, jointly and severally, for having committed the tort of trespass. We hereby affirm that part of the decision of the COA which had affirmed the same order by the HCJ. The assessment of damages shall be heard before another HCJ of the High Court of Sabah and Sarawak sitting at Kuching.

[78] As to costs, each party to bear own costs. Order accordingly.

[79] Mention date to fix the hearing date for the assessment of damages shall be within 14 days from today.